A

MALAYSIA BUILDING SOCIETY BHD

v.

MERIT AIM SDN BHD & ANOR; CAMERON MALL SDN BHD & ANOR (INTERVENERS)

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[COMPANIES (WINDING-UP) PETITION
NO: D3-28-726-2003]
C 22 AUGUST 2011

LAND LAW: *Charge - Order for Sale - Chargor in liquidation - Whether charged property could be sold by private treaty after abortive auctions - Amount due to chargee under Order for Sale almost thrice* D *redemption sum it quoted to facilitate private sale - Whether chargee's acceptance of smaller sum would adversely affect other creditors and contributories - Whether amounted to compromise or arrangement requiring sanction of court - Whether property should be auctioned according to procedure prescribed in National Land Code - Companies Act 1965,* E *s. 236 - National Land Code, ss. 257, 266, 267A*

The petitioner, Malaysia Building Society Bhd ('MBSB') had obtained an Order for Sale of land that had been charged to it by the respondent. The respondent had been wound up and the F Director-General of Insolvency ('DGI') was appointed the liquidator. Two public auctions of the land had failed to secure a buyer. The two interveners in the action, Cameron Mall Sdn Bhd ('Cameron Mall') and Active Rhythm Sdn Bhd ('Active Rhythm') were interested in purchasing the land. Cameron Mall negotiated directly with MBSB who agreed to accept a redemption sum of G RM12m to facilitate the sale subject to the DGI's consent. Cameron Mall paid MBSB a deposit of RM1.2m and entered a caveat on the land pending approval of the sale from the Insolvency Department's headquarters. Meanwhile, Active Rhythm dealt directly with the Insolvency Department to buy the land for H RM13m, of which RM12m would be MBSB's redemption sum and the surplus would be used to pay the liquidator's fees and any balance thereafter would be shared amongst the creditors. Active Rhythm formalised the deal by signing a sale and purchase agreement with the DGI. The Insolvency Department's I headquarters rejected Cameron Mall's offer, stating it had received

a higher offer for the land, and accepted Active Rhythm's offer. Both Cameron Mall and Active Rhythm made separate applications to court; each party moving the court to favour it as the valid purchaser of the land.

Held (setting aside sale and purchase agreement between respondent and Active Rhythm; ordering MBSB to proceed with public auction of land pursuant to Order for Sale):

(1) The amount due to MBSB under the Order for Sale was RM35,058,460.44. Unless such an amount was tendered to court under s. 266(1) of the National Land Code, MBSB had no business not to proceed with the auction sale. (paras 36 & 37)

(2) By accepting RM12m for redemption, MBSB was entering into a compromise or arrangement to the detriment of other creditors and contributories. Although appearing as a redemption sum, it was essentially acceptance of a smaller sum to discharge the chargor's liability under the charge. (para 47)

(3) Acceptance of a smaller sum from the sale of the charged land would leave a bigger amount falling into the unsecured portion of the debt, leaving the other unsecured creditors with even less to take home when whatever balance was divided *pari passu*. Being a compromise or arrangement between the liquidator and MBSB, any failure to obtain leave of court under s. 236(1)(c) of the Companies Act 1965 would render the sale void. (para 47)

(4) Assuming the DGI as the liquidator could proceed with the sale by way of private treaty with Active Rhythm, a compromise had been effected without the court's approval under s. 236(1)(c) of the Companies Act. In any event, there had been a lack of probity in the acceptance of Active Rhythm's offer and the conclusion of the sale and purchase agreement. (para 59)

(5) Liquidation of the chargor did not make the process of a judicial sale pursuant to an Order for Sale different from when there was no such liquidation. There was nothing to prevent MBSB from applying for another date for a public auction sale with a reduction, perhaps, of another 10% from the last reserve price. (paras 36 & 45)

[All monies paid by Active Rhythm to DGI be refunded; all caveats lodged on land by Cameron Mall and Active Rhythm be removed.]

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

Commerce International Merchant Bankers Berhad v. Metroplex Holdings Sdn Bhd [2010] 1 LNS 553 HC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Lee Chiu Hing Realty Sdn Bhd v. Atlas Corporation Sdn Bhd [2009] 1 LNS 342 ***(refd)***

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Other Appeals [2012] 2 CLJ 535 CA ***(refd)***

United Malayan Banking Corp Bhd v. Chong Bun Sun & Another Case [1994] 2 CLJ 673 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 236(1), (2)(c)

National Land Code, ss. 257(1)(g), 266(1), (2), 267A, 268

For the petitioners - Mohd Khairuddin; M/s Zeffree Azmi

For the intervener Cameron Mall - Mureli Navaratnam (Ong Yu Shin with him); M/s Mureli Navaratnam

For the intervener Active Rhythm - Ahmad Musthafi (Tabian Tahir with him); M/s Tabian Tahir & Co

For the DGI - Rosli Ahmad (Muhammad Azmi, Yusnita Wagino & Noor Fazilah with him); SFCs

For the liquidator Gabriel Teoh - Amran Aminuddin; M/s Dennis Nik & Wong

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Cameron Mall Sdn Bhd (Cameron Mall) was interested in a piece of land in Cameron Highlands. The land is registered in the name of the respondent, Merit Aim Sdn Bhd that had gone into liquidation. The land is held under H S (D) 293 P T No. 1005, Bandar Tanah Rata, Daerah Cameron Highland, Pahang. The land is charged to the Petitioner Malaysia Building Society Bhd (MBSB). Cameron Mall negotiated with MBSB direct with respect to the redemption sum it was prepared to accept as purchase price because the loan outstanding was much more than the

market value of the land. MBSB finally agreed to a redemption sum of RM12 million subject always to the consent of DGI who is the liquidator of the respondent.

[2] Unbeknown to Cameron Mall there was another party interested in the same land. That party was Active Rhythm Sdn Bhd (Active Rhythm) and it negotiated direct with the DGI who finally agreed to sign a sale and purchase agreement dated 12 October 2010 for a purchase price of RM13 million subject to the consent of MBSB with respect to the redemption sum.

[3] However in both cases the final redemption sum for the land remained at RM12 million. The balance in the second case would partially go towards covering the liquidator's fees.

[4] It must be stated that MBSB had already obtained an order for sale for the land on 19 September 2002. The chargor/ respondent was wound up in 19 November 2003. There had been two unsuccessful auctions; one on 13 December 2002 for a reserved price of RM18 million and a second one on 26 November 2004 for a reserved price of RM17.3 million.

Problem

[5] Cameron Mall was obviously unhappy over what they perceived to be Active Rhythm gazumping in and scuttling its deal with MBSB. MBSB had on 10 February 2010 issued a letter of offer to Thong Shin Development Sdn Bhd (Thong Shin) which offer was made subject to contract and on a without prejudice basis wherein MBSB agreed to accept a sum of RM12 million to redeem the land and that the offer was conditional upon consent being obtained from the DGI for the purchase. (Exhibit T1 encl. 25). There followed some correspondence between the parties and on 1 March 2010 Messrs Mureli Navaratnam wrote to the Jabatan Insolvensi Malaysia Wilayah Persekutuan (JIM WP) acting for Cameron Mall, the nominee of Thong Shin enclosing the letter of offer from MBSB dated 10 February 2010 and stating that their client was interested in purchasing the land and in redeeming the land from MBSB. It basically asked for consent of the DGI to the said sale.

[6] The JIM WP on 30 March 2010 replied to the said solicitors stating that they have no objection to Cameron Mall's application but that they would need to inform headquarters about it and that they would inform the said solicitors on any decision made. (Exhibit T4 encl. 25)

[7] On 16 April 2010 JIM WP forwarded the application of Cameron Mall to JIM HQ Putrajaya.

[8] Cameron Mall had also on 16 April 2010 lodged a private caveat on the land and it stated that it had paid an earnest deposit of RM600,000 to MBSB and that DGI's consent to the purchase was pending. The said sum was paid on 11 February 2010.

[9] There was a meeting on 21 April 2010 at the JIM WP attended by representatives of Cameron Mall and JIM WP and the following was part of the minutes kept by Mafuza binti Ahmad of JIM WP and exhibited as exh. NF4, encl. 33:

> Agenda: To discuss how to expedite sale of land
>
> JIM: The process of sale would depend on the decision made at HQ where the Jawatan Kuasa Unit Jualan Aset (JUJA) will decide. JIM will examine and see if the land is subject to a charge. If it is, JIM will apply to the chargee to see if they will proceed with auction and refund the surplus to JIM.
>
> If an auction has been carried out before, the chargee can proceed for sale by private treaty.
>
> If the chargee should give authority to JIM to sell the land, we will follow the procedure and conditions already fixed. (An English translation of the Bahasa Malaysia version)

[10] However lo and behold, on 22 April 2010 Active Rhythm through its solicitors Messrs Tabian Tahir & Co, wrote to JIM WP and the content of the letter is important enough for reproduction below with the caption of 'Confirmation to Purchase':

> We act for Active Rhythm Sdn Bhd of No. 55C, Jalan Sungai Besi, 57100, Kuala Lumpur.
>
> We write to confirm that our client is willing and able to purchase the Property above mentioned for a total purchase sum of RM13 million only.
>
> We enclose herewith the photocopy of the Banker's Cheque CIMB No: 571138 for a sum of RM1.3 Million being the 10% amount of the **agreed purchase price of RM13 Million only** payable to KETUA PENGARAH INSOLVENSI dated today.

> Please be informed that we shall draft and prepare the Sale & Purchase Agreement to be signed within fourteen (14) days from today with the terms and conditions to be agreed upon by both parties.
>
> Thereafter within ninety (90) days plus ninety (90) days grace period from the date of the Sale & Purchase Price of RM13 Million aforementioned. For the ninety (90) days grace period, an interest of 8% per annum on the balance sum shall be payable to you.
>
> We also enclose herewith the SSM Official Search for your attention. (emphasis added)

[11] On 27 May 2010 JUJA at its meeting at JIM HQ accepted Active Rhythm's offer of RM13 million and Messrs Tabian Tahir & Co was duly informed by JIM WP *vide* its letter of 27 May 2010. (Exhibit NF 8, encl. 33)

[12] On the same day JIM WP also wrote to Messrs Mureli Navaratnam informing them that Cameron Mall's offer could not be accepted because they had received a higher offer.

[13] On 31 May 2010 Active Rhythm forwarded the original Banker's Cheque for the sum of RM1.3 million to the DGI and the same was cleared on 2 June 2010.

[14] Meanwhile Messrs Mureli Navaratnam had on 31 May 2010 accepted the letter of offer dated 15 April 2010 issued by MBSB to Thong Shin (exh. T6 encl. 25) and Cameron Mall paid the sum of RM1.2 million to MBSB being the balance 15% deposit.

[15] MBSB being caught in the middle wrote to JIM WP in their letter dated 1 June 2010 expressing hope that JIM WP do not consider the offer of Active Rhythm as they had been negotiating with Cameron Mall. (Exhibit NF 10 encl. 33). MBSB also sought the DGI's consent for the sale of the land to Cameron Mall. By a further letter dated 8 June 2010 to JIM WP, MBSB stated that it had not received any notice or given any consent regarding offer from JIM to Active Rhythm until recently, when they received on 31 May 2010 a letter dated 26 May 2010 from JIM stating that it had issued a letter of offer to Active Rhythm. MBSB registered their strongest objection to the sale by the DGI to Active Rhythm. (Exhibit T11 encl. 25)

[16] Cameron Mall's complaint is that Active Rhythm had gazumped in on them and that someone from the DGI's office must have leaked out the information. How else to explain the fact that the RM13 million was the agreed purchase price when at that time not even the consent of MBSB to the redemption sum had been obtained.

[17] I had asked learned counsel for Active Rhythm, Encik Ahmad Musthafi, to file in their client's affidavit as to who his client spoke to on the agreed purchase price of RM13 million and SFC Encik Rosli Ahmad from the DGI office to get the relevant officer to reply accordingly. Alas, nothing was forthcoming from both.

[18] A further sore point was when Cameron Mall discovered that the redemption sum for both its offer and that of Active Rhythm is the same RM12 million! The balance of the amount in the offer of RM13 million by Active Rhythm would go towards paying the liquidator's fees and the rest to be shared by other creditors.

[19] However in reality there were hardly anything left to be shared because only two creditors had filed their proof of debt. MBSB filed its proof of debt for RM22,621,304.88 being the shortfall amount after deducting the estimated value of the land which was held as a security by MBSB and Allson International Management Limited filing a proof of debt for RM235,499.58.

[20] Learned counsel for Cameron Mall, Mr Mureli Navaratnam castigated the conduct of the DGI as being questionable in telling them to get consent from MBSB first which they had already obtained and now with respect to Active Rhythm, the DGI proceeded to accept its offer without getting MBSB's consent first and indeed as can be seen above, MBSB was raising its concerns and objections.

[21] Cameron Mall's lament is understandable as it has been negotiating with MBSB since February 2010. It said that it was not a case of it not being able to come up with an increased purchase price because it was only told that the fees to be paid to JIM for executing the Sale and Purchase Agreement was only RM500 and if it had been told that there is the liquidator's fees of some RM783,000, it said it would have no hesitation paying. The said fees is said to be due pursuant to Schedule C of the Companies (Winding Up) Rules 1972.

Prayer

[22] Disappointed over what had happened it filed an application in encl. 24 to pray for *inter alia* the following:

(a) Leave to intervene in the proceeding;

(b) Leave to proceed against the respondent in liquidation;

(c) An order that the decision of the DGI as liquidator of the respondent in its letter dated 27 May 2010 not to give consent to Cameron Mall to purchase the land is null and void;

(d) A specific performance order against the DGI as liquidator of the respondent to give consent to Cameron Mall to purchase the land for RM12 million;

(e) That MBSB as chargee do give effect to the said purchase by Cameron Mall;

(f) A specific performance order against the DGI to execute the relevant sale and purchase agreement for the sale of the land to Cameron Mall;

(g) That the sale and purchase agreement dated 12 October 2010 between the DGI as liquidator of the respondent and Active Rhythm regarding the land be declared null and void;

(h) That costs be borne by the DGI as liquidator of the respondent; and

(i) Such further and other reliefs as deemed fit and just by the Honourable Court.

[23] Active Rhythm also applied by encl. 30 to intervene in the proceeding to object to the reliefs prayed for by Cameron Mall. The DGI of course objected to the reliefs claimed by Cameron Mall.

[24] I allowed both Cameron Mall and Active Rhythm to intervene because they both have substantial interest in the outcome of the action, both being interested in the subject land and both having entered into negotiations with MBSB and the DGI and Active Rhythm having signed a sale and purchase

A agreement with DGI as liquidator for the respondent. Cameron Mall on the other hand had paid the initial deposit of RM1.2 million to MBSB.

[25] Senior Federal Counsel Encik Rosli Ahmad for the DGI was
B magnanimous in not objecting to the leave to intervene by both Cameron Mall and Active Rhythm.

[26] I now deal with the merits of the applications of Cameron Mall and Active Rhythm.

C **Principle**

[27] The issue of whether after an order for sale has been made and indeed unsuccessful auctions have been conducted, can a chargee proceed to apply to the court for a private treaty sale.
D This matter has been discussed in full in the decision of His Lordship Dr Visu Sinnadurai J in *United Malayan Banking Corp Bhd v. Chong Bun Sun @ Chang Bun Sun & Another Case* [1994] 2 CLJ 673.

E **[28]** At p. 681 His Lordship wrestled with the appealing notion that there is nothing preventing the chargor from tendering the full amount outstanding before the conclusion of the sale:

> (b) Right of chargor to sell by private treaty after an order for sale
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> F
>
> Section 266(1) of the National Land Code provides that the chargor, against whom an order for sale has been made may, at any time before the conclusion of the sale, tender the money owing to the chargee. The said section reads as follows:
>
> G Any chargor against whom an order for sale has been made under this Chapter may, **at any time before the conclusion of the sale**, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order
> H shall thereupon cease to have effect.
>
> This provision is in line with the principle that the chargor always retains a right to discharge a charge: see Mohd Jemuri SCJ (as he then was) in *Malayan United Finance Bhd. v. Tan Lay Soo* [1991] 1 SCR 105, at p. 114.
>
> I

The most obvious manner in which the chargor may tender the money owing to the chargee is for the chargor **to repay the chargee the outstanding loan, including interest thereon, which the chargor had borrowed.** This the chargor may do either by obtaining the funds to repay the loan from some other independent source, or by selling the charged property to a third party. In the latter situation, the chargor may enter into a private treaty with a third party to purchase the charged property. The chargor, in such a situation may, from the proceeds of this sale, tender the said sum owing to the chargee.

There appears to be no local decision clearly dealing with the issue as to whether the chargor may sell the charged property by way of private treaty after an order for sale has been ordered. However, the recent decision of the Supreme Court in *M & J Frozen Food Sdn. Bhd. v. Siland Sendirian Berhad* [1994] 1 SCR 197, appears to lend weight to the argument that the chargor still retains such a right. Wan Yahya SCJ observed (at p. 214):

Even after the order of sale has been made and when the auction sale was already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owed the chargee (which may be less than the value of the land on sale) and call off the sale; s. 266 National Land Code. The exercise of such rights does not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

The Supreme Court in *M & J Frozen Food Sdn. Bhd.* above held that the chargor retained his rights and interests in the land even after an order for sale had been made by the Court. Wan Yahaya SCJ, in discussing the ambit of the chargor's rights observed (at p. 213):

The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the Court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss. 257 and 258.

His Lordship added (at p. 213):

... the divesting of the chargor's right occurs only on completion of the contract of sale and conveyance ... .

It therefore appears that until the sale of the charged property to a third party at a public auction is concluded, the chargor retains the right to discharge the charge by selling the charged property. If the chargor decides to do so, it is, however, **prudent for the**

A **chargor to obtain the consent of the chargee.** It would be most unusual for the chargee, in such circumstances to refuse consent, for *after all, a sale by private treaty by the chargor, with the consent of the chargee cannot adversely affect the chargee, so long as the chargee is repaid the sum owing.* In such a situation, strictly
B speaking, there is no necessity for the chargor to apply to the Court for any order, especially when the consent of the chargee has been obtained. The earlier order for sale made by the Court ceases to have effect under s. 266 of the National Land Code. (emphasis added)

C **[29]** His Lordship Dr Visu Sinnadurai rightly refused the application by the Chargee bank for a sale by private treaty though in one case there had been six unsuccessful auctions. The reason was clearly stated:

D In so making the order for sale, certain matters need to be dealt with by the court. Under s. 257 of the National Land Code every order for sale made by the court shall provide as follows:

(a) provide for the sale to be by public auction; (b) require the sale to be held on, or as soon as may be after, a date specified
E therein, being a date not less than one month after the date on which the order is made; (c) specify the total amount due to the chargee at the date on which the order is made; and (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of
F the land or lease in question.

[30] In other words there are statutory safeguards for the chargor to ensure that the sale is done with the utmost transparency and that the best possible price is to be obtained where everyone
G interested to bid is allowed to, in compliance with the practice direction ie, the Registrar's Circular No. 1 of 2005 and the Auction Sales Enactment FMS Cap 81. I had occasion to deal with this area of law in *Commerce International Merchant Bankers Berhad v. Metroplex Holdings Sdn Bhd* [2010] 1 LNS 553; [2010]
H 8 AMR 281 at p. 288:

A second complaint advanced by the Defendant Chargor is that there must be compliance with Section 258(2)(a) National Land Code 1965 in that the Proclamation of Sale shall be prepared by the Plaintiff (Chargee). This is not what is spelled out in Section
I 4 of the Auction Sales Enactment FMS Cap. 81 which applicable

to the Federal Territory of Kuala Lumpur *vide* P.U. (A) 63/1974. The Proclamation of Sale is prepared by the auctioneer appointed by the Court. The Conditions of Sale on the other hand is prepared by the Chargee as stated in Section 258(2)(a):

> (2) The Chargee on whose application the order was made shall-(a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the Court;

The interplay of Section 4 of the Auction Sales Enactment and Section 258(1)(b) and 2(a) of the National Land Code has been eloquently elucidated by Siti Norma Yaakob JCA (as she then was) in *Leong Moh Sawmill Co. Sdn Bhd. v. Standard Chartered Bank & Ors.* [1997] 2 CLJ 131 at page143 as follows:

> We will start by considering whether the provisions of s. 258(1)(b) and (2)(a) of the NLC have been breached by the predecessor bank. These two subsections set out the procedure to be followed after an order of sale has been obtained and prior to the execution of the sale itself. Section 258(1)(b) is directed to the Registrar of the High Court and it empowers such Registrar to see that the sale is advertised publicly in accordance with any rules of Court or in the absence of such rules the customary practice in the State. There are no specific rules regulating the procedure for advertising a judicial sale by public auction. The Rules of the High Court 1980, where one expects such procedure to be set out, is silent on this although there is a chapter on charge actions in O. 83 and another chapter, O. 31, that makes provisions as to the directions to be given when carrying out such sale.
>
> However there are provisions in s. 4 of the Auction Sales Enactment FMS Cap. 81 regulating what particulars a public notice or proclamation of sale should contain and the onus is on the auctioneer, conducting the sale, to prepare and advertise such sale. What happens in practice is that the auctioneer named by the Court to conduct the sale, working together with the chargee, draws up the proclamation of sale containing all particulars as required by s. 4 and submits the proclamation of sale for approval to the SAR. Once approved, the auctioneer will take all the necessary steps to have the proclamation of sale advertised. In this way the SAR would have seen that the sale has been publicly advertised as is required of him under s. 258(1)(b) and (2)(a) of the NLC.

A What is stated as being silent in the Rules of the High Court is now being supplemented by Registrar's Circular No. 1 of 2005 which repealed Practice Note No. 2/1987, Practice Direction No. 8/1987, Practice Direction 5/1989, Practice Note 5/1989, Chief Registrar's Circular 1/1997 and Practice Direction 3/1998.

B **[31]** Being a judicial sale, the proclamation of sale would set out the detailed terms and conditions of sale for all to see who are keen to bid. There is thus no need to haggle over what should be incorporated into a sale and purchase agreement. The terms and conditions of sale as prepared by a court appointed C auctioneer would have to be approved by the Senior Assistant Registrar of Court. With the need for public advertisement of the proclamation of sale, there is not only openness, transparency and full disclosure, but not for anyone to accuse the chargee or the liquidator of preceding anyone or that some side deal has been D done.

[32] It takes away through the uncertainty as to whether a contract has come into being especially in a private sale where as in this case MBSB left with little choice, have to take the stand E that the redemption letter issued to Cameron Mall was just a letter of offer and that the private sale is still subject to the DGI consent. On the other hand the DGI is telling Active Rhythm that the sale to you is subject to MBSB's consent. MBSB who had been hitherto dealing with Cameron Mall was quick to write to F the DGI not to proceed to offer to Active Rhythm because they have been negotiating since February 2010 with Cameron Mall and indeed had received the earnest deposit and subsequently the initial deposit towards the purchase price.

G **[33]** Parliament in its wisdom has spelt out a clear procedure to follow in a case of a judicial sale pursuant to an order for sale. One only has to follow the Rules of the High Court 1980, the procedure set out in the National Land Code 1965, the relevant Registrar's Circular No. 1 of 2005 and the relevant Auction Sales H Enactment. Upon the fall of the hammer, a concluded sale and purchase agreement comes into being and upon the full payment of the purchase price to the chargee the certificate of sale would be executed by the Registrar of Court and there should no problem with the passing of the title to the successful bidder and I the realisation of the full proceeds of sale.

[34] What we have here was that such a procedure was not followed and the result is two parties Cameron Mall and Active Rhythm claiming they are valid purchaser of the charged property. The chargee do not stand to get one sen more as in both cases the redemption sum is RM12 million. The liquidator gets his fees which ranges from RM500 for executing the sale and purchase agreement to RM783,000 said to be due pursuant to Schedule C of the Companies (Winding-Up) Rules 1972. Even if there is a balance left it goes towards paying quit rent and assessment and one wonders how much that is, as the order for sale had been obtained in 19 September 2002.

[35] For non-compliance with such a time-tested and time-honoured procedure there is now all kinds of complaints and perceptions formed with respect to the sequence of events that happened in quick succession from 22 April 2010 (date of 'agreed purchase price' letter from Active Rhythm's solicitors to JIM WP) to 27 May 2010 (date of JIM WP rejecting Cameron Mall's offer to purchase and accepting Active Rhythm's offer to purchase).

[36] The situation is no different between a case where the chargor is in liquidation and one where the chargor is not. The liquidator cannot do more than what a chargor can ordinarily do if there is no liquidation. Liquidation does not make the process of a judicial sale pursuant to an order for sale different from when there is no liquidation. Section 266(1) of the National Land Code is clear:

> Any chargor against whom an order for sale has been made under this Chapter may, **at any time before the conclusion of the sale, tender the amounts specified in sub-section (2)** to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect. (emphasis added)

[37] We must not forget that here we are dealing with a case where the amount due as stated in s. 266(2) is the amount stated as owing to the chargee as at the date of the order for sale. That amount is much more than what the parties were prepared to pay to MBSB for full redemption whether it be the whole RM12 million or RM12 million out of RM13 million. The amount due to the chargee under the order for sale of 9 September 2002 is RM35,058,460,44. Unless such an amount is so tendered the

chargee has no business not to proceed with the auction sale. Even in *United Malayan Banking Corp* case *(supra)* His Lordship disallowed a private treaty sale eventhough in one case there had been six unsuccessful auctions. We may say it is more convenient but what appears convenient may be fraught with complaints later on especially from an unsuccessful bidder who perceived that the playing field is not level and that a successful bidder had gazumped in on him.

[38] The protection here under the National Land Code is such that there is a strict timeframe of not later than 120 days from the date of the auction sale for the balance purchase price to be paid and there shall be no extension of time for the period so specified. (Section 257(1)(g) NLC). In the event the bidder could not pay the balance purchase price on time, the deposit paid is forfeited to the account of the Chargor and the land put up for re-auction again. Section 267A NLC provides:

> **267A. Application of deposit upon failure to settle purchase price etc ...**
>
> Where the purchaser fails to settle the balance of the purchase price within the period specified in the order for sale under section 257 or 263, the deposit shall be forfeited and shall be applied by the chargee as follows:
>
> (a) firstly, in the payment of all moneys due specified in paragraphs (a) and (b) of sub-section (1) of section 268; and
>
> (b) secondly, in the payment of the balance if any, retained in the account of the chargor for the purpose of reducing the amount due to the chargee in the order of priority specified in paragraphs (c), (d) and (e) of sub-section (1) of section 268.

[39] Here we have a case where eventhough the sale and purchase agreement had been signed in 12 October 2010 the sale has yet to be completed. Clause 2.1 states that balance purchase price is to be paid within 60 days from the date of the sale and purchase agreement. When asked why this is so, parties involved were quick to point accusing fingers at one another!

[40] Encik Rosli Ahmad for the DGI said the new liquidator Mr. Gabriel Teoh had been appointed *vide* DGI's application on 25 October 2010 (encl. 33). He said that all relevant documents had been given to the new liquidator on 15 December 2010.

However new liquidator could only pay the bond of RM2,000 on 9 December 2010. Until the bond is paid the files could not be passed. New liquidator said he could not pay the bond earlier because he only got the sealed order appointing him on 3 December 2010.

[41] The new liquidator refused to send the Transfer Form14A NLC until he sees the sale and purchase agreement which he said was not given him until much later. He wrote in to MBSB to ask for the redemption sum and MBSB replied to say it is RM13.5 million by its letter to him dated 17 January 2011. He was perplexed as he wondered where the balance purchase price is going to come from. He said until he knows for sure the fact that MBSB had consented to the sale he would not sign the Form 14A. The solicitors for Active Rhythm said that the delay is not their client's fault because the new liquidator also refused to sign the State Authority Consent application. I asked why that is necessary as there is no restriction in interest as evidenced from the land search result. Learned counsel for Active Rhythm said when they inquired from the land office a staff told them that the application must still be made. I set out all these to show the comedy of complications and accusations that parties find themselves to be in. As to when the balance purchase price can be paid no one could say with any certainty. All these would have been a thing of the past if a judicial sale under the NLC had been followed.

[42] The high watermark case on this issue as to whether a Chargee can avoid proceeding to completion a judicial sale and substitute therefore a sale through a receiver or liquidator *via* private treaty is clearly the decision of his Lordship Edgar Joseph Jr, FJC, in the Supreme Court case *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274 where his Lordship said at p. 277:

> … The provisions of ss. 254 to 265 of the Code are designed to protect the chargor and they cannot be waived or contracted out by him. These provisions, as well as those other provisions in Part XVI of the Code setting out the rights and remedies of parties under a statutory charge over land, are **exhaustive and exclusive,** and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary to public policy … (emphasis added)

[43] His Lordship continued at p. 294:

> It is obvious that the relevant portions of the Code, to wit, ss. 254-265, conferring the rights upon chargors aforesaid are designed for their protection …

[44] It must be recalled that the Receiver and Manager wanted to sell the land other than through judicial sale under the NLC and this was objected to by the liquidator as subsequently the chargor went into liquidation. There was nothing preventing the chargee from proceeding with a judicial sale under the NLC in the light of the defaults in the loans secured over charged properties.

[45] Likewise here there is nothing preventing the application by the chargee for another auction date for a sale *via* public auction with a reduction perhaps of another 10% from the last reserve price. Now that property market has improved or at least there is more than one party interested in the land, the parties might want to endeavor to outbid one another to the benefit of the chargee and the chargor and its guarantors, as anything higher in terms of the purchase price would reduce the final indebtedness of the chargor and its guarantors. Indeed speed and saving of costs would also be a factor to proceed with a judicial sale. Liquidator's fees are not cheap as can be seen in the RM783,000 quoted and exacted and to be carved out from the purchase price. Under the current system of speedy disposal of cases, an application for a next auction date can be heard within a month with the approval of the terms in the proposed Proclaimation of Sale by the SAR done as well. An auction date can then be fixed. Everything is done in full view of the public who may want to bid and if so their 10% deposit has first to be deposited with the court. The proceeds from the auction sale is applied towards the payment of the rent due to the State Authority and the fees and expenses incurred by the auctioneer as may be approved by the court and then only can the balance be enjoyed by the secured creditor in the person of the chargee. See s. 268 NLC. I dare say it would be over long before the current parties quibble and quarrel over who is at fault and whether there has been any impropriety in the conduct of the private treaty sale.

[46] I was referred to the decision of his Lordship Ramly Ali, J (as he then was) in *Abric Project Management Sdn. Bhd. v. Palmshine Plaza Sdn. Bhd. & Anor* [2007] 7 CLJ 516 at p. 584-585 where his Lordship sought to distinguish the facts in *Kimlim*'s case. It is

my unfortunate lot to come to a different conclusion from that of his Lordship and I do so with the greatest of respect. His Lordship was of the view that nowhere did the Supreme Court in *Kimlim* forward the proposition that a liquidator could not sell land subject to a charge. That is of course true if it is in the context of no order for sale having been made. If a chargor could not sell a charged land once an order for sale has been granted, how then can a liquidator be able to do so bypassing the provision of the NLC? It is true that the liquidator was opposing the sale in *Kimlim*'s case but irrespective of whether there is objection by the liquidator, if a procedure is wrong, it is still wrong irrespective of no objection by the liquidator. In *Kimlin*'s case the Supreme Court declared that the proper procedure in the case of a sale of charged land where there has been default is by way of judicial sale under the NLC. *Abric*'s case was not one where there had been an order for sale obtained. In such a case just as a chargor can sell the land charged subject to the charge and a redemption being done, so also a liquidator who steps into the shoes of a chargor in liquidation can do so.

[47] A further interesting question raised was whether MBSB by accepting a sum of RM12 million for redemption was entering into a compromise or arrangement to the detriment of other creditors and contributories. I hold that though externally appearing as a redemption sum, it is in essence and essentially an acceptance of effectively a smaller sum to discharge the liability of the chargor under the charge as there is no indication that there are other assets left of the chargor to be realised by the secured creditor or unsecured creditor. An acceptance of a smaller amount to be satisfied by the sale of the charged land would leave a bigger amount falling into the unsecured portion of the debt leaving the other unsecured creditor with even less to take home when whatever balance is divided *pari passu*.

[48] Being a compromise or arrangement between the Liquidator and the secured chargee MBSB any failure to obtain leave or sanction of the court under s. 236(1)(c) of the Companies Act 1965 would render the sale void.

[49] I am aware that his Lordship Ramly Ali J (as he then was) in *Abric*'s case had come to a different decision holding that there had been no compromise at all. It is again my unfortunate lot to have to come to a different conclusion and his Lordship's reasons are as set out below at p. 537:

A [48] The court is of the view that the sale transaction in the present case cannot amount to a compromise or arrangement as envisaged under s. 236(1)(c) of the Companies Act 1965. First, HSBC is not in the same position as that of all the other creditors under the liquidation. Instead, HSBC is a secured creditor; in that
B HSBC holds a registered charge over the said land and therefore takes priority over the proceeds from its sale. Secondly, cl. 4 of the sale and purchase agreement with regards to the payment of the purchase price does not in any way imply a compromise. As stated above, the said land is subject to a charge in favour of HSBC totaling RM33,000,000 as security for facilities rendered to
C the 1st respondent by HSBC. Before the said land can be sold free of encumbrances, a discharge of charge would have to be given by HSBC. Payment of the purchase price proceeds directly to HSBC was the only way in which HSBC would consent to the sale. The sale was conducted within the powers extended in
D s. 236(2)(c) of the Companies Act 1965, wherein prior court sanction is not required.

[50] His Lordship continued at p. 538:

[50] In any event, here, the total proceeds of sale fell clearly
E short of fully repaying the outstanding amount owed to HSBC. As a secured creditor, HSBC, would have priority over the proceeds of sale of the charged property.

[51] Section 236(2)(c) Companies Act 1965 does provide that:

F (2) The liquidator may:

(c) sell the immovable and movable property and things in action of the company by **public auction, public tender or private contract** with power to transfer the whole thereof to any person or company or to sell the same in parcels; … (emphasis added)

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[52] The powers given to a liquidator to sell any immovable property by public auction, public tender or private contract must necessarily be confined to those cases where the land is unencumbered or even if encumbered, so long as no order for sale
H has been made. Otherwise the protection that was designed for the chargor could be easily removed by bypassing a judicial sale once a chargor is in liquidation. If at all, a chargor would need all the more protection once it goes under liquidation. This is irrespective of whether the proceeds from a judicial is less than or
I more than the amount outstanding.

[53] It can be argued that as s. 236(2)(c) Companies Act envisages a situation where it is appropriate for a public auction to be held, that harmonises with cases where an Order for Sale has been made and the chargor went into liquidation subsequently.

[54] Learned counsel for the DGI submitted that there is no impropriety in the action of the DGI and so this court should not set aside the sale to Active Rhythm.

[55] I have considered all the relevant principles enunciated below with respect to the fact that the court should be slow in setting aside the decision of the liquidator.

[56] His Lordship Kang Hwee Gee, J (as he then was) in *Lee Chiu Hing Realty Sdn Bhd v. Atlas Corporation Sdn Bhd* [2009] 1 LNS 342 observed at p. 344:

> (4) A decision made by a liquidator in the process of winding up a company should not be disturbed by the court save in very exceptional circumstances, much less to exercise its equitable jurisdiction to construct a remedial trust against a decision of the liquidator lawfully made. *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 3 MLJ 571 (foll).

[57] His Lordship Ramly Ali, J (as he then was) in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516 summarised the principles of a generally not disturbing the decision of a liquidator made in good faith at pp. 532 to 534 as follows:

> [34] The liquidator is empowered under s. 236(2)(c) of the Companies Act 1965 ('CA') to use his discretion when selling movable or immovable property of the company in liquidation. At all material times, this discretion is subject to the control of the court as provided in s. 236(3) of the Companies Act 1965 which states:
>
> > the exercise by the liquidator of the power conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

A [35] It is also stated in s. 279 of the same Act that:

> any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm reverse or modify the act or decision complained of and make such order as it thinks just.

B [36] By reason of the lack of particularisation in encl. 37, one can only surmise that as a contributory, the applicant seeks to challenge the decision of the liquidator in selling the said land under these provisions.

C [37] In this regard, the case of *Chin Ah Keow @ Chin Lai Sitt v. Anggun Pintas Sdn Bhd & 3 Ors* [2005] 1 LNS 92 appears to be relevant to the present facts. In that case, the plaintiff had also sought to challenge the decision of the liquidators (second and third defendants) appointed over the first defendant in accepting a D tender submitted by the fourth defendant pursuant to s. 279 of the Companies Act 1965. In arriving at its decision as to the test to be met, the court referred to the following cases with approval:

> (a) In *Re Edennote Ltd Tottenham Hotspurs PLC & Ors v. Ryman and Anor* [1995] 2 BCLC 248 where it was held E that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that the liquidator had acted utterly unreasonably or, though acting in good faith took into account considerations which he ought not to have F taken into account or failed to take into account considerations which he ought to have taken into account;
>
> (b) In *Re Equity Funds of Australia (in Liq)* [1976-1977] 2 ACLR 238, where his Lordship Bowen CJ applied a similar G test when he held:
>
> in my view, the test to be applied under s 279 is similar to that applying to the exercise of discretion which is committed by statute to some particular official. The principles applied by the court in such cases are reasonably H well settled.
>
> The court will recognise that discretion has been vested by the statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct question or that he made errors of law or that he failed to I take into account relevant matters or that he took into

> account irrelevant matters, to which may be added that if his decision in the circumstances appears such that no reasonable man could arrive at it, the court will interfere…
>
> [38] Basically, the court should be slow to interfere with any act or decision of the liquidator in discharging their roles in company's liquidation particularly in matters involving sale of company's assets which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidator has acted utterly unreasonably.

[58] On the other hand there is a high standard of conduct exacted of a liquidator as an officer of the court. As rightly reminded by his Lordship Abdul Malik Ishak JCA in the Court of Appeal decision in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Other Appeals* [2012] 2 CLJ 535:

> ... As officers of the court, the liquidators are not above the law and must uphold the integrity and sanctity and transparency of the open public tender exercise which is a judicial sale. The judicial sale must be seen to be impartial and above board ....

[59] Assuming for a moment that the DGI as the liquidator could proceed with the sale by way of private treaty with Active Rhythm inspite of *Kimlin*'s decision and *United Malayan Banking Corp v. Chong Bun Sun & Anor (supra)* I hold that there has been a compromise effected without the approval of the court under s. 236(1)(c) of the Companies Act 1965 and that in any event there has been a lack of probity in the acceptance of the offer of Active Rhythm and the conclusion of the sale and purchase agreement.

Pronouncement

[60] Taking into consideration all the circumstances of this case, the sale and purchase agreement dated 22 January 2010 between Merit Aim Sdn Bhd (In Liquidation) and Active Rhythm is hereby set aside and that all monies paid by Active Rhythm to the DGI is to be refunded within 14 days from the date of the order.

[61] This court also made an order that all caveats lodged by all parties to this proceeding ie, Cameron Mall and Active Rhythm be removed within 14 days from the date of the order.

[62] This court further ordered that the petitioner/chargee MBSB do proceed with the public auction pursuant to the order for sale obtained and following the procedure in the NLC and the relevant practice direction on judicial auction sale.

[63] As for costs, taking into consideration the respective conduct of all the parties, an appropriate order would be that each party bear their own costs.

Postscript

[64] Both wanted the same piece of land but neither of them shall have it. However either one of them or someone else might still have it. This time around all shall play by the same rules. The field shall be level. There shall be nothing concealed or hidden. Everything shall be disclosed and revealed. Transparency shall be maintained throughout the judicial sale exercise. There is a price we all must pay to get the thing we want to possess. All things being equal the one who pays the highest should walk home with his prized possession. At the end of the day not everyone will be happy for there shall only be one successful bidder but no one would have cause for complaint. That is the closest we can approximate to a fair system and solution and no one should settle for less.